INFORMATION LETTER

Not for Publication **NATIONAL CANNERS ASSOCIATION** For Members Only

No. 746 Washington, D. C. June 10, 1939

SUPREME COURT HOLDS AGRICULTURAL MARKETING ACT CONSTITUTIONAL

Divided Court Sustains Validity of Imposed Milk Control by A.A.A.

On Monday, June 5th, the United States Supreme Court, by a 5-3 decision, sustained the constitutional validity of imposed marketing control under the Agricultural Marketing Agreement Act of 1937. This sweeping decision concerning the power of the Federal Government to regulate prices in the handling of agricultural commodities, upholding pooling of proceeds and classification of commodities, recognizing the propriety of special treatment for cooperative producer organizations, and approving broad delegation of powers to the Secretary of Agriculture to impose marketing control, merits careful consideration by all canners in view of the pending House bill, H.R. 6208, which seeks to eliminate the exemption for canning crops in the same Act and to subject fruits and vegetables for canning to somewhat similar control.

In each of the two groups of cases, *United States* v. *Rock Royal Co-operative, Inc.* and *H. P. Hood & Sons, Inc.* v. *United States*, the Federal Government sought an injunction to require compliance with the provisions of an Order regulating the shipment, sale, and prices to be paid for milk. In the *Rock Royal* cases an Order covering the New York City milk shed was held invalid by the lower court, whereas in the *Hood* cases an Order covering the Boston milk shed was sustained. Both groups of cases were reviewed at the same time. The majority of the Supreme Court, speaking through Mr. Justice Reed, sustained both Orders in their entirety. Mr. Justice Roberts, joined by Mr. Justice McReynolds and Mr. Justice Butler, dissented in both cases on the ground that there was excessive delegation of power to the Secretary of Agriculture. Mr. Justice Roberts also dissented in the *Rock Royal* case on the ground that the price pooling provisions in the Order were discriminatory and on this point of dissent Chief Justice Hughes also joined. Mr. Justice McReynolds and Mr. Justice Butler jointly dissented on the further ground that Congress had no authority to regulate private business even in the production and distribution of milk in interstate commerce. Mr. Justice Black and the newly appointed Mr. Justice Douglas concurred specially, but did not accept that part of the Court's opinion which based the power to regulate upon the important public interest in the milk business, but asserted that there was no constitutional limitation on the power of Congress to regulate interstate commerce in any manner.

Orders Imposed Without Marketing Agreements

The Court first summarized the provisions of the Act, pointing out that control schemes might be imposed even though the processors, called in the Act "handlers," did not sign a Marketing Agreement.

"Section 8b authorizes the Secretary of Agriculture to enter into marketing agreements with the producers and others engaged in the handling of agricultural commodities in or affecting interstate commerce. These agreements may be for all agricultural commodities and their products, are entirely voluntary and may cover the handling of the commodity by any person engaged in the various operations of processing or distribution. Agreements are involved only incidentally in this proceeding.

"Section 8c provides for a use of orders, instead of agreements, in certain situations. These orders apply only to specified commodities, including milk. They are to be entered only when the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of the Act with respect to any commodity or product thereof, and after notice and an opportunity for hearing. It is necessary also for the Secretary of Agriculture to set forth in such order a finding upon the evidence introduced at the hearing that the issuance of the Order and of the terms and conditions thereof will tend to effectuate the declared policy. When, as here, the commodity is milk, the Act requires that the Order contain one or more of terms specified in Section 8c(5) and no others, except certain terms common to all orders and set out in Section 8c(7). These terms, as used in the Order under examination, will be referred to later. Orders may only be issued after hearing upon a marketing agreement which regulates the handling

(Continued on page 5873)

HOUSE DENIES RULES SUSPENSION

Refuses to Consider Norton Bill Without Opportunity to Offer Amendments

The House on Monday, June 5, refused to consider, under a suspension of the rules, the Norton bill (H. R. 5435) to amend the Fair Labor Standards Act. The bill, however, remains on the calendar.

The bill on which Chairman Norton asked suspension of the rules contained the amendments to the agricultural provisions as reported in last week's INFORMATION LETTER, also an additional amendment, which provided that any agricultural exemption in effect on June 15, 1939, under the Fair Labor Standards Act, or regulations issued thereunder, should continue in effect notwithstanding the enactment of the proposed bill. The amendment would have made statutory the Administrator's definition of "area of production."

When Mrs. Norton offered her motion to suspend the rules a second was demanded. Under the House rules when a second is demanded on a motion to suspend the rules, the second must be approved by a majority vote before a vote can be taken on the motion, and the motion itself must be approved by a two-thirds majority. On a teller vote the House refused the second by a vote of 167 to 110. Had the motion for suspension of rules been adopted, the House could have approved or rejected the bill as amended by the

Committee, but no amendments could have been offered from the floor.

The bill, as previously stated, remains on the calendar and it can be brought before the House through action of the Rules Committee. Representative Cox of Georgia, ranking member of the Rules Committee, has advised the House that in his opinion the Rules Committee, if requested, would grant an "open rule" for the consideration of the measure. Under an "open rule" any member of the House would be permitted to offer amendments to the bill.

In view of the demands of the farm organizations for the adoption of amendments to the Fair Labor Standards Act, such as the Barden-Miller bills propose (See INFORMATION LETTER No. 743), it seems likely that the Rules Committee in the near future will be asked for a rule that will provide for free consideration of the Norton bill. Supporters of agricultural exemptions would then be able to offer amendments to the bill and would be assured of House consideration of their suggestions.

CONGRESS SUMMARY

During the past week, the Senate passed the District of Columbia Appropriation bill, approved the conference report on the strategic war materials bill, and debated and passed amendments to the National Housing Act. The Senate also concurred in a minor amendment adopted by the House to the resolution which advances the effective date of the government reorganization program to July 1, 1939.

The House on Monday rejected a motion to suspend the rules and pass the Norton amendments to the wage and hour law (see page 5871), and on Tuesday began debate on proposed changes to the Social Security Act. An analysis of the bill under debate will be found on page 5877. On Wednesday the House passed the Coffee bill, which is designed to regulate the interstate shipment of seeds.

Senator Bone of Washington introduced on June 6 a bill (S. 2558) to subject pears for canning to the order sections of the Marketing Agreements Act. The bill has been referred to the Senate Agricultural Committee. A similar proposal introduced sometime ago by Representative Hill of Washington is pending before the House Committee on Agriculture, along with the Jones bill (H. R. 6208) which would repeal the canning crops exemption from the order sections of the Act.

The Senate Commerce Committee reported favorably to the Senate on June 7 the Pepper bill (S. 1852) authorizing the appropriation of 40 per cent of the customs duties on fishery products to establish a government advertising program for the fisheries and for the purchase and distribution of surplus fishery products through relief channels.

The Secretary of Commerce, through the National Bureau of Standards, would be authorized and directed "to establish and publish standards of quality for consumer goods (excepting foods, drugs, cosmetics, and other articles for which Federal standards are now provided by law, when in his judgment such standards are in the public interest." According to the terms of a bill (H. R. 6652) introduced on June 5 by Representative Boren of Oklahoma, the requirements of the proposed law would not be mandatory, but would permit the use of special labels on goods conforming to the established Federal standards.

Committee Votes to Continue D. C. Business Tax

Provisions for the continuation of the District of Columbia business privilege tax will be contained in the new District of Columbia revenue bill that will be reported to the House early next week. The House Committee on the District of Columbia voted June 8 to continue the tax that would otherwise automatically expire at the end of the present current fiscal year, June 30, 1939.

STANDARDIZATION OF CONTAINERS

National Weights and Measures Conference Adopts Recommendations

Standardization of packages used for the retail distribution of food and other consumer goods was one of the principal subjects of discussion during the three-day meeting of the National Conference on weights and measures in Washington this week. The meeting on Thursday was devoted largely to the discussion of standardization of canned food containers. The problems involved in such standardization, as well as appropriate methods of accomplishing it, were presented by Carlos Campbell of the Association's Division of Statistics, Dr. F. F. Fitzgerald, research director of the American Can Company, and other speakers.

As a result of these discussions, the delegates in attendance at the meeting were impressed with the fact that the standardization of canned food containers involves problems differing from, and more difficult to handle, than the standardization of packages for other forms of goods.

The conference adopted a report containing a recommendation that Federal legislation be initiated that would standardize the quantities of all commodities sold in packages or containers of any kind, and also recommended that the pending Somers bill be so amended as not to conflict with such recommended legislation. It was further recommended that the standards be restricted to the following capacities:

(1) 1, 2, 3, and 4 ounces, both fluid and avoirdupois weight.

(2) 6 fluid ounces for fruit juices only, where contents of container is sold to be consumed on the premises. (The reason for this is the requirement of the industry for hotel and restaurant use; a 6-ounce glass of fruit juice is usually served.)

(3) 8, 12, 16, 24, and 32 ounces avoirdupois weight, and multiples of the pound thereafter.

(4) 8, 12, 16, 24, and 32 fluid ounces and multiples of the pint to the ½ gallon; ½ gallon and gallon; and multiples of 1 gallon thereafter.

(5) Containers of different standards to be so constructed that the different sizes are easily discernible, this to be accomplished by fixing the diameter or the base measurements of the container and letting the industry change the height of the respective containers to fit the particular commodity.

(6) The height of the container to be no more than is required for the particular commodity at the time of packing.

bottling, or canning, so as to allow for cooling or natural shrinkage.

(7) The net weight or net measure to be in the above units not at the time of packing, bottling or canning, but at the time of sale to the consumer.

SUPREME COURT HOLDS AGRICULTURAL MARKETING ACT CONSTITUTIONAL

(Continued from page 5871)

of the commodity in the same manner as the order. Without special determination of the Secretary of Agriculture and approval of the President, orders are not to become effective unless approved by handlers as required by the Act.

"Notwithstanding the refusal or failure of handlers to sign a marketing agreement relating to such commodity, the Secretary of Agriculture, with the approval of the President, may issue an order without the adoption of an agreement if he determines that the refusal or failure of the handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy with respect to the commodity and that the issuance of the order is the only practical means of advancing the interest of the producers. In such a case the order must be approved or favored by two-thirds of the producers in number or volume who have been engaged, during a representative period, in the production for market of the commodity within the production area or two-thirds of those engaged in the production of the commodity for sale in the marketing area specified in the marketing agreement or order. Section 8c(9). Section 8c(19) authorizes a referendum to determine whether the issuance of the order is approved by the producers. Section 8c(12) provides that the Secretary shall consider the approval or disapproval by any cooperative association as the approval or disapproval of the producers who are members, stockholders or patrons of the cooperative association."

Lower Court Held Producer Approval Improperly Secured

The first question presented was whether the manner in which the Secretary had determined that two-thirds of the milk producers approved the Order was proper. Inasmuch as the question of producer approval—where processors refuse or fail to sign a proposed marketing agreement—is a vital part of the Act, the opinion of the Court on this point is extremely interesting.

"*Adoption of the Order.* Before considering the validity of the Marketing Act and the provisions of the Order under attack, we shall examine the contention of the defendants that the Order was adopted under circumstances which require a court of equity to refuse to enforce it. After dealers had refused or failed to sign the proposed marketing agreement, the Secretary conducted a referendum under Section 8c(19) to ascertain whether the issuance of Order No. 27 was approved by two-thirds of the producers, as required by Section 8c(9). Vigorous campaigns were waged by both proponents and opponents of the Order. Among the proponents were the League and the Agency. [These were the Dairymen's League Cooperative Association and the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. —two milk producers organizations.] After the vote, the Secretary on August 24, 1938, with the approval of the President, determined that the issuance of the Order was favored by at least two-thirds of the producers, and declared it effective as of September 1, 1938.

"The defendants base their appeal to the conscience of the chancellor upon matters connected with the referendum which they claim amount to fraud in its adoption. The alleged fraud is said to consist of widespread public misrepresentations to the effect that all producers would receive the same price for their milk and a conspiracy between the League and others to convert the state and national acts into instruments for the creation of a monopoly in large handlers in the sale of fluid milk in the marketing area."

After reviewing the evidence in detail, the Supreme Court noted that the lower court had—

"found that the conspiracy to obtain a monopoly was carried out by coercive tactics on the part of producers, under the leadership of the League and the Agency. These tactics consisted of threats to handlers that if they did not comply with the Order, the producers would withhold delivery of milk. These schemes, the lower court determined, were so successful in securing the drafting, adoption and acceptance of the Order that a conspiracy to monopolize interstate commerce contrary to the Sherman Act was established. It held that the occurrence of the incidents just detailed compelled refusal of the injunction. We do not agree.

Supreme Court Holds Producer Approval Properly Determined

"While considering the manner of the adoption of the Order, the validity of the Act and the provisions of the Order must be assumed. The Order was submitted to the producers for approval after the hearings specified in the statute. The full text of the Order with explanatory pamphlets was mailed each prospective voter. In the face of this fact, erroneous statements cannot be permitted to render the submission futile. There is no evidence that any producer misunderstood. A casual sentence in one of the pamphlets of the Department of Agriculture and a number of other statements in publications of the League and Agency were to the effect that dealers would pay all producers the uniform price for milk. Such assertions need the qualifications given in the Order that they are not applicable to milk sold outside the marketing area or to milk handled by cooperatives. The variation from the facts is not immaterial in view of the value or volume of milk involved. But the Order, Article VII, plainly stated that cooperatives were not covered by the payment requirements and it appeared, also, that milk sold outside the marketing area was not within its terms. A study of the official form of the Order would have cleared up any misconception created by the language. The Secretary of Agriculture declared that three-fourths of the producers affected by the Order approved its terms. The litigants do not deny that three-fourths of the voters voted for the institution of the Order. There is no authority in the courts to go behind this conclusion of the Secretary to inquire into the influences which caused the producers to favor the resolution.

"The coercion by the League and the Agency, exercised upon the handlers after the adoption of the Order to force or induce them to acquiesce in its operation, is of the same indirect character as the alleged misrepresentation. It is the partisan coercion of the producer seeking to compel dealer support of the plan by the threat of the use of his economic power over his own milk. The coercion was ineffective upon these defendants. Producers' organizations urged in their papers and meetings diversion of milk from handlers to influence them to agree to the Order. Such efforts could not have had an effect on the prior vote of the producers. It is quite true that the League which itself cast two-thirds of the favorable votes was in a position to cast more than one-third of the total qualified vote against the Order. This arises from the provision of the Act, authorizing cooperatives

to express the approval or disapproval for all of their members or patrons. *This is not an unreasonable provision, as the cooperative is the marketing agency of those for whom it votes.* If the power is in the Congress to put the order in effect, the manner of the demonstration of further approval is likewise under its control. These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. *If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction.*"

Special Exemptions for Producer Cooperatives Held Proper

The particular milk Order required all handlers to pay to producers a uniform price for milk but exempted producer cooperatives from this requirement. In answering an asserted constitutional objection to this provision, the Court remarked:

"The Jetter Dairy Company, a proprietary [*i.e.*, non-cooperative private company] handler, urges that as milk cooperatives need not pay producers a uniform price, it is unreasonably discriminatory and violative of the due process clause of the Fifth Amendment to require it to pay this uniform price. In Section 8c(5)(F) there is a definition of the type of cooperative permitted to settle with its members in accordance with the membership contract. The general characteristics of cooperatives are well understood. The Capper-Volstead Act defines such cooperatives as associations of producers, corporate or otherwise, with or without capital stock, marketing their product for the mutual benefit of the members as producers with equal voting privileges, restricted dividends on capital employed and dealings limited to 50 percent non-member products. Different treatment has been accorded marketing cooperatives by state and Federal legislation alike. Indeed the Secretary is charged by this Act to 'accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.' These agricultural cooperatives are the means by which farmers and stockmen enter in to the processing and distribution of their crops and livestock. The distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment."

* * * * * *

"The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit. For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons."

"The commodity handled by a cooperative corresponds for some purposes to the capital of a business corporation. Either may cut sale prices below cost one as long as its members will deliver, the other as long as its assets permit. When proprietary corporations lower sales prices, they naturally seek to lower purchase prices. Their profit depends on spread. On the other hand, the cooperative cannot pass the reduction. All the selling price less expense is available for distribution to its patrons. As its own members bear the burden of price cutting, it was reasonable to exempt it from the payment of the fixed price. The cooperative member measures his return by the market or uniform price the business handler pays. In commodities with the wide market of staple dairy products, quotations are readily available. If distributions do not equal open prices, the cooperators' reactions would parallel those of stockholders of losing businesses. Neither the Act nor the order protects anyone from lawful competition, nor is it essential that they should do so. We do not find an unreasonable discrimination in excepting producers' cooperatives from the requirement to pay a uniform price."

In this same connection the Court swept aside all objection to particular provisions permitting special benefits to cooperatives. It likewise sustained in both cases the right of the Secretary to accept the approval of the cooperative as approval of the proposed Order without a referendum of the membership. In the *Hood* case it noted that

"Two cooperatives voted for their members in favor of the amendments to the Order. *No poll was taken of the individual producer members. Nor was there any subsequent approval by them of the action taken on their behalf by the cooperatives.* Section 8c(12) directs the Secretary to consider the approval or disapproval of cooperatives as the approval or disapproval of members. This is complete authority for the action of the Secretary. He need not require further referendums by cooperatives themselves. Presumably they will vote with an eye to the best interest of their members."

Constitutionality of Federal Price Fixing of Milk

With respect to the power of the Federal Government constitutionally to fix minimum prices and to the contention that production and sale of milk is purely intra-state, the Court said:

II. Constitutionality of the Act.

"A. *Minimum Prices.* The Act authorizes and the Order undertakes the fixing of minimum prices for the purchase of milk 'in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce' in milk. There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce. Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the Federal authority covers the sales of this milk, as its marketing is inextricably intermingled with and directly affects the marketing in the area of the milk which moves across state lines."

"The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce. We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the Federal power to regulate inspection of the whole. Activities conducted within state lines do not by this fact alone escape the sweep of

the Commerce Clause. Interstate commerce may be dependent upon them. Power to establish quotas for interstate marketing gives power to name quotas for that which is to be left within the state of production. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales.

"This power over commerce when it exists is complete and perfect. It has been exercised to fix a wage scale for a limited period, railroad tariffs and fees and charges for livestock exchanges.

"The authority of the Federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce. Since *Munn* v. *Illinois*, this Court has had occasion repeatedly to give consideration to the action of states in regulating prices. Recently, upon a reexamination of the grounds of state power over prices, that power was phrased by this Court to mean that 'upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells'."

After reviewing the many cases in which the constitutional power of the States to regulate the production and price of milk had been sustained on the ground that an adequate supply of milk was a vital public necessity, the Court stated broadly that

"the power enjoyed by the states to regulate prices for handling and selling commodities within their internal commerce rests with the Congress in the commerce between the states".

Strong objection was taken by the defendants to complicated provisions of the respective milk Orders which created a "producer settlement fund" into which certain payments had to be made and the proceeds of which were distributed as an equalization pool to adjust prices among producers. The argument was that through the pooling arrangement handlers were precluded from paying their own producers a particular price and were forced to contribute to equalization payments made out of the pool to other producers with whom they did not deal. These arguments were rejected.

"The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation, designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. In *Mulford* v. *Smith* we made it clear that volume of commodity movement might be controlled or discouraged. As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, we are of the opinion it might permit the movement on terms of pool settlement here provided.

"Common funds for equalizing risks are not unknown and have not been considered violative of due process. The pooling principle was upheld in workmen's compensation, bank deposit insurance, and distribution of benefits in the Transportation Act."

Broad Delegation to Secretary of Power to Impose Orders

Finally, there was strong attack upon the broad delegation to the Secretary of Agriculture to issue Orders, to include or exclude particular provisions, to have an Order apply or not apply to particular regions, to include geographical and other price differentials, etc. Although these powers are among the broadest ever delegated to an administrative officer, all of the objections were rejected by the Court.

"From the earliest days the Congress has been compelled to leave to the administrative officers of the Government authority to determine facts which were to put legislation into effect and the details of regulations which would implement the more general enactments. It is well settled, therefore, that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied. In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable. The present Act, we believe, satisfies these tests.

"1. *Delegation to the Secretary of Agriculture.* The purpose of the Act is 'to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period.' To accomplish this, the Secretary of Agriculture is directed to issue orders, whenever he has reason to believe the issuance of an order will tend to effectuate the declared policy of the act. Unlike the language of the National Industrial Recovery Act condemned in the *Schechter* case, page 538, the tests here to determine the purpose and the powers dependent upon that conclusion are defined. In the Recovery Act the Declaration of Policy was couched in most general terms. In this Act it is to restore parity prices, Section 2. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the business covered. Here the terms of orders are limited to the specific provisions, minutely set out in 8c(5) and (7). While considerable flexibility is provided by 8c(7) (D), it gives opportunity only to include provisions auxiliary to those definitely specified.

"The Secretary is not permitted freedom of choice as to the commodities which he may attempt to aid by an order. The Act, Section 8c(2), limits him to milk, fresh fruits except apples, tobacco, fresh vegetables, soybeans and naval stores. The Act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. A city milkshed seems homogeneous. This standard of practicality is a limit on the power to issue orders. It determines when an order may be promulgated.

"It is further to be observed that the Order could not be and was not issued until after the hearing and findings as required by Section 8c(4). Public hearings were held at Albany, Malone, Syracuse, Elmira, and New York from May 16 to June 7, 1938, with four days' recess. Nearly three thousand pages of testimony were introduced, eighty-eight documentary exhibits and some twenty briefs by interested parties were filed. On July 23, 1938, the Secretary, in the Federal Register, notified the public of his findings and the terms of the Order and again invited comment.

Numerous parties again filed briefs. A right by statute is given handlers to object to the Secretary to any provision of an order as not 'in accordance with law,' with the privilege of appeal to the courts. Section 8c(15) (A) and (B). Even though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority. * * *

"2. *Delegation to Producers.* Under Section 8c(9) (B) of the Act it is provided that any order shall become effective notwithstanding the failure of 50 percent of the handlers to approve a similar agreement, if the Secretary of Agriculture with the approval of the President determines, among other things, that the issuance of the order is approved by two-thirds of the producers interested or by interested producers of two-thirds of the volume produced for the market of the specified production area. By subsection 19 it is provided that for the purpose of ascertaining whether the issuance of such order is approved 'the Secretary may conduct a referendum among producers.' The objection is made that this is an unlawful delegation to producers of the legislative power to put an order into effect in a market. In considering this question, we must assume that the Congress had the power to put this Order into effect without the approval of anyone. *Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation.*

"3. *Authorization of Cooperatives to Cast the Votes of Producer Patrons.* This objection, too, falls before the answering argument that inasmuch as Congress could place the Order in effect without any vote, it is permissible for it to provide for approval or disapproval in such way or manner as it may choose."

Dissent of Mr. Justice Roberts

Mr. Justice Roberts' dissent with respect to the price pooling provisions of the particular Order is probably not of general interest. His dissent on the ground that undue power was delegated to the secretary may be summarized:

"In my view the Act vests in the Secretary authority to determine, first, what of a number of enumerated commodities shall be regulated; second, in what areas the commodity shall be regulated; third, the period of regulation, and, fourth, the character of regulation to be imposed and, for these reasons, cannot be sustained.

"The statute is an attempted delegation to an executive officer of authority to impose regulations within supposed limits and according to supposed standards so vague as in effect to invest him with uncontrolled power of legislation. Congress has not directed that the marketing of milk shall be regulated. Congress has not directed that regulation shall be imposed throughout the United States or in any specified portion thereof. It has left the choice of both locations and areas to the Secretary. Congress has not provided that regulation anywhere shall become effective at any specified date, or remain effective for any specified period. Congress has permitted such a variety of forms of regulation as to invest the Secretary with a choice of discrete systems each having the characteristics of an independent and complete statute.

"Section 8c(2) provides that the Secretary may make orders in respect of eight specified agricultural products. It embodies no directions as to the specific conditions which shall move him to issue orders affecting each of the named commodities. The same section permits the promulgation of orders applicable to specified regions. It omits any restriction or direction as to the size or location of the area to be affected by a regional order. It leaves the Secretary free to determine when regulation shall become effective, when it shall be terminated throughout the United States or in any portion thereof.

"The supposed standards by which the Secretary is to be governed turn out, upon examination, to be no standards whatever. All of the choices mentioned are, according to the Act, to be made if the Secretary has reason to believe, or finds, that his proposed action will 'tend to effectuate the declared policy' of the Act.

"We turn, therefore, to Sec. 2, which declares the policy of the Congress to be: 'through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period,' which base period is defined as a period of years antedating the passage of the Act. The section further declares the policy to be worked out through the Secretary to be 'To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.'

"Assuming that any of these proposed ends or aims were in themselves capable of reasonable definition, it is, nevertheless, evident that the Secretary is to form a judgment by balancing a price raising policy against a consumer-protection policy, according to his views of feasibility and public interest.

"If then the separate objects to be attained were matters susceptible of a definite finding there would still be the inescapable result that, after such definite finding as to each proposed aim, there must be an exercise of judgment as to the extent to which that aim should be accomplished in the light of other and conflicting aims. And there would still remain the fact that the conclusion might be against any regulation by reason of the Secretary's unrestrained judgment that, in the circumstances, regulation is not 'feasible.'

"Enough has been said to show that a law is to come into being on the basis of the Secretary's sole judgment as to its probable effect upon the milk industry, its probable effect upon the consumer, its probable consonance with the public interest, and its feasibility. The resolution of all such problems is of the essence of law making.

Power Delegated to Secretary Virtually Unlimited

"But if, as the Act discloses, the supposed standards whereby the Secretary is to ascertain the elements which are to determine his ultimate decision are themselves so vague that neither he nor anyone can accurately apply them, the unlimited nature of the delegation becomes even clearer.

"The first thing the Secretary is permitted to accomplish by regulation, so the statute declares, is the parity in purchasing power of the price to be received by producers with that received in the base period. This parity is to be in terms of things farmers purchase. A moment's reflection will show that any calculation of such parity is impossible. The things farmers purchase, the relative quantities in which they purchase them, and their price in terms of milk, vary from

month to month and from year to year. Moreover, the Secretary is not to establish a parity between two past periods but is to regulate the industry in such fashion as will, in his opinion, produce for the future a parity of the purchasing power of milk with its purchasing power in the base period. The Secretary's conclusion must lie in the realm of hope or opinion and not in that of ascertained fact. The major objective of the Act is in truth to raise prices paid farmers for milk. The upward limit is really left to the Secretary's uncontrolled discretion.

"Turn now to another alleged standard which is to control the Secretary's action. He is not to raise prices so fast as to injure the interest of the consumer but is to raise them gradually by correction of the current level at as rapid a rate as he deems to be in the public interest and feasible in view of consumptive demand. It is fair to ask whether this constitutes a standard at all. What is the public interest? Must not Congress ascertain and declare it? What is feasible in the way of regulation? Is not this a matter for legislative judgment? How is anyone to tell whether the Secretary has disobeyed the mandate of Congress in these respects?

"There is in the Act a further delegation of power. Congress might, although committing to the Secretary's will and judgment the matters above enumerated, have directed him how to regulate the industry if he determined so to do. It might have considered the possible modes of regulation and provided which of them the Secretary should adopt. The Act does no such thing. It leaves to the Secretary the choice of different and mutually exclusive methods of control.

"In respect of the choice of method, the only guide is the declaration of policy embodied in Section 2. If the Secretary is of opinion that one method is more likely to raise prices than another he is at liberty to put into the form of an order what is tantamount to a statute prescribing the method of his choice. Thus the Secretary is to decide not only whether there is to be a law but, as well, the nature of the law to be enacted.

"* * * No authority cited by the Government presents a situation comparable to that here disclosed. It would not be profitable to analyze each of the cases because in each the question of the nature of the statutory standard and its application in the administration of the statute involved depended upon the field which the legislation covers. Where delegation has been sustained the court has been careful to point out the circumstances which made it possible to prescribe a standard by which administrative action was confined and directed. Such a standard, as respects milk marketing, is lacking in the Agricultural Marketing Agreement Act of 1937."

Justices McReynolds and Butler Dissent from Whole Opinion

The dissent of Mr. Justice McReynolds and Mr. Justice Butler to the entire Act was very short. It read:

"In our view the challenged order of the Secretary must succumb to two manifest objections. It is unnecessary for us to dissect the record in search of other impediments.

"*First.* Congress possesses the powers delegated by the Constitution—no others. The opinion of this Court in *Schechter Poultry Corporation* v. *United States* (1935), 295 U. S. 495—noteworthy because of modernity and reaffirmation of ancient doctrine—sufficiently demonstrates the absence of Congressional authority to manage private business affairs under the transparent guise of regulating interstate commerce. True, production and distribution of milk are most important enterprises, not easy of wise execution; but so is breeding the cows, authors of the commodity; also, sowing and reaping the fodder which inspires them.

"*Second.* If perchance Congress possesses power to manage the milk business within the various states, authority so to do cannot be committed to another. A cursory examination of the statute shows clearly enough the design to allow a secretary to prescribe according to his own errant will and then to execute. This is not government by law but by caprice. Whimseys may displace deliberate action by chosen representatives and become rules of conduct. To us the outcome seems wholly incompatible with the system under which we are supposed to live."

SOCIAL SECURITY LAW REVISION

Amendments Now Pending Would Make Important Savings in Taxes to be Paid

Many important changes in the taxes levied under the Federal Social Security Act, affecting important tax-savings, are proposed in H.R. 6635, introduced by Mr. Doughton, which was reported favorably by the House Ways and Means Committee on June 2. This bill, which would make comprehensive amendments to the entire Social Security Act, is the culmination of several months' work on the part of the committee, during which extended hearings were held. It contains many of the amendments recommended by the Social Security Board.

Much of the bill relates to changes in the provisions of the Act under which old-age benefits are paid, and to the various programs for maternal and child welfare and for assistance to aged, to dependent children and to the blind. For the most part these programs and benefit provisions are liberalized. The changes made in the tax structure are, however, quite important and will be summarized generally.

One of the most important changes that the bill makes is the continuance at 1% of the old-age benefit tax rate which otherwise would have increased to 1½% on January 1, 1940. The present Act provides that the old-age benefit taxes levied under Title VIII, at the present rate of 1%, shall be increased on January 1, 1940, to 1½%. The rate would then remain at 1½% until 1943 when it would rise to 2% and thereafter rise gradually until it reached 3% in 1949. The bill continues the rate at 1% until 1943 when it would then be increased to 2%.

Tax savings will also be realized in connection with the Federal Unemployment Compensation taxes levied under Title IX of the Act. At the present these taxes are levied (at the rate of 3%) on the *total payroll*. The bill proposes that in the future these taxes be levied only on the first $3,000 of wages paid to each individual employee. In addition to reducing the taxes payable, this amendment will also simplify bookkeeping and the filing of returns by bringing about uniformity between the unemployment compensation and the old-age benefits taxes, since the latter are at present levied only on the first $3,000 of wages.

The bill contains other provisions designed to increase the uniformity between the unemployment compensation and the old-age benefits taxes. The tax base under the unemployment compensation portions of the Act is changed from "wages payable" to "wages paid" to conform to the present

base for the old-age benefit taxes. "Casual labor" which is now exempt from the old-age taxes will in the future be exempt from the unemployment compensation taxes as well, and conversely, family employment (the employment by an individual of his mother, father, spouse, or child under 21) will in the future be exempt from both taxes whereas it is now exempt from unemployment compensation taxes only. Similarly, the exemption for persons over 65 years of age which now exists under the old-age taxes is deleted, so that in the future these elderly workers will be subject to both taxes.

The uniformity which these amendments will achieve may mean that in the future it will be possible to file a single Federal tax return covering both taxes instead of the separate returns now required for both unemployment compensation and old-age taxes.

The bill also makes important changes in scope of the exemptions afforded from the taxes, most important of which is a new definition of "agricultural labor" which will increase the number of workers exempt as agricultural labor. It will be recalled that "agricultural labor" is not defined in the present Act, but only in Bureau of Internal Revenue regulations. Under these regulations an employee may perform services on a farm directly connected with the cultivation or harvesting of crops, yet not be exempt as "agricultural labor" unless he is employed by the owner or tenant of the farm. The bill writes into the Act an extensive definition of agricultural labor which, among other things, eliminates this requirement that a worker must be employed by the owner or tenant of the farm. This will be important to canners, since in many instances a canner may furnish workers to his growers to assist in the cultivation, spraying, or harvesting of the crops. Under the amendment such workers will be exempt without the necessity of proving that they are employees of the farmer rather than of the canner. This change applies to both old-age and unemployment compensation taxes.

The new definition of "agricultural labor" will also exempt from taxation many of the employees of farmers' cooperative associations who are not exempt because not employed by the owner or tenant of the farm. Indeed, all employees of such cooperatives will be exempt if the cooperative is one exempt from Federal income taxation.

The new definition of "agricultural labor" apparently makes no change, however, in the application of the Act to persons employed in canneries. It will be recalled that services performed in canning are considered agricultural under present regulations only if an incident to ordinary farming rather than commercial operations, and only if performed for the owner or tenant of the farm. The bill eliminates the latter requirement that the work must be performed for the owner or tenant of the farm, but specifies that the work must be incident to the preparation of the farm products for market, and specifically states that "commercial canning" is not exempt.

Another important change in coverage is the extension of the old-age taxes to *seamen*. It will be recalled that under the present law neither the old-age or the unemployment compensation taxes apply to seamen. The bill proposes that the *old-age* taxes be extended to seamen employed on American vessels, although the exemption of seamen from the *unemployment compensation* taxes is retained.

Changes are also made in the definition of "wages" which are subject to tax (the tax, it will be recalled is levied on "wages" paid to employees). The bill provides that "wages" shall not include payments made by an employer to his employees, or into an employee fund, to provide for retirement, disability due to sickness or accident, or for the medical expenses incurred because of sickness or accident. These payments must, however, be made under a plan applicable to all employees or to all of a class of employees. In addition, dismissal payments which the employer is not legally required to make are not to be considered wages. Under the present Act and Regulations, these payments are considered wages. These changes in the definition of "wages" are applicable to both the old-age and the unemployment compensation taxes.

In addition, the bill makes changes in the provisions of the Act relating to credit of state taxes against the Federal unemployment compensation taxes. It will be recalled that taxes paid under a state act may be credited against the Federal tax up to 90%, but only if the state taxes are paid on or before the date the Federal return is due. This strict requirement has resulted in many employers paying double taxes because of failure to qualify for the credit. The bill provides that even if the state taxes are not paid on or before the date the Federal return is due (January 31), the employer may still obtain a somewhat smaller credit (approximately 80% instead of 90%) if the taxes are paid on or before July 1. In addition, the bill authorizes refunds to taxpayers who failed to obtain the credit for the years 1936, 1937, and 1938.

Finally, the bill provides that states may reduce their state-wide level of contribution rates below 2.7%, and taxpayers will still be allowed full credit against the Federal tax, if the state meets certain specified minimum standards as to benefit payments. This provision is intended to allow states which are accumulating large reserves to make a general reduction in their contribution rates.

Governor Lehman Vetoes Truck Bill

Governor Lehman of New York State has vetoed the Bewley bill, which sought to amend the Public Service Law in relation to interference with acceptance or delivery of goods, wares, or merchandise transported in motor trucks. Organized labor had strongly protested the measure.

Seattle Selected for Food-Stamp Test

Seattle has been selected as the third city in which the food-stamp plan for distributing agricultural surpluses will be tested, it was announced June 8. The stamp plan was inaugurated in Rochester, New York, on May 16, and in Dayton, Ohio, the sale of stamps began June 5.

Corn Products Companies Served with Complaints

Similar to the amended complaint issued a few months ago against Corn Products Refining Co. of New York, the Federal Trade Commission has served complaints on eight or-

ganizations producing corn products both for household and industrial use. The complaints allege violation of the Robinson-Patman Act by giving discriminatory prices on starch, glucose, and corn sugar, and on such by-products as corn oil and cattle feed.

The eight companies named respondents are: Anheuser-Busch, Inc., St. Louis; Piel Brothers Starch Company, Indianapolis; Clinton Company, Clinton, Iowa, and Clinton Sales Company, Chicago; The Hubinger Company, Keokuk, Iowa; Penick & Ford, Ltd., Inc., New York; A. E. Staley Manufacturing Company and the Staley Sales Corporation, Decatur, Ill.; Union Starch & Refining Co. and Union Sales Corporation, Columbus, Ind., and American Maize-Products Company, New York.

Wisconsin Loss-Leader Law Becomes Effective

The Wisconsin unfair sales law, designed to prevent loss leaders, became effective June 3. According to Section 3 of the Act, any advertising, offer to sell, or sale of any merchandise, with the intent, or effect, of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, or otherwise injuring a competitor, is prohibited, when such offer or sale is to tend to deceive any purchaser or to substantially lessen, restrain trade, or create a monopoly. The provisions of the Act are applicable to retailers as well as wholesalers.

New York Governor Vetoes "Unfair Sales" Bill

The Esquirol-Parsons bill, which would have prohibited below-cost selling in New York State, was vetoed June 7 by Governor Lehman on the ground that it was unenforceable. The bill sought to establish a retail mark-up of 6 per cent over cost, and a wholesale mark-up of 2 per cent, and made violation a misdemeanor.

It was patterned after the model unfair sales bill of the National Food and Grocery Conference Committee, with the exception that the model bill does not contain any wholesale mark-up provisions.

"Summertime Recipes" Distributed to Members

The third recipe booklet in the series that the Service Kitchen of the Association's Home Economics Division is publishing, has been mailed to members of the Association. The title is "Summertime Recipes for Canned Foods." Additional copies are available on request.

All recipes in this leaflet have been thoroughly tested in the Service Kitchen.

Veterans Bureau Asks Bids on Canned Cherries

The Veterans Administration has asked for bids to be opened June 29, on 1,427½ cases of canned red sour pitted cherries, packed in No. 10 cans, six to the case. Deliveries are to be made to Perryville, Md.; San Francisco, Calif.; and Chicago, Ill.

Copies of the bid can be obtained from the Procurement Division, Veterans Administration, Arlington Bldg., Washington, D. C.

UNSOLD STOCKS OF CANNED SALMON

Unsold stocks of canned salmon on May 31, 1939, totaled 1,070,059 actual cases, compared with 1,255,289 cases on April 30, 1939, according to statistics compiled by the Association of Pacific Fisheries. These figures represent the combined reports of 79 companies, which packed 98 per cent of the 1938 pack. No reports were issued for March, April, and May, 1938, so the usual comparison with the corresponding month of 1938 cannot be given. The following table provides statistics of canned salmon stocks for April and May, 1939, by grades or varieties and by can sizes:

Grades or Varieties	Talls (1 pound)	Flats (1 pound)	Halves (8 dozen)	Total May 31, 1939	Total April 30, 1939
Chinooks or Kings:	*Cases*	*Cases*	*Cases*	*Cases*	*Cases*
Fancy Red	5,300	12,157	18,972	36,429	42,195
Standard	2,162	2,165	6,826	11,153	10,939
Pale	1,210	246	147	1,603	1,464
White	....	33	296	329	427
Puget Sound Sockeyes	....	3,680	47,571	51,251	62,781
Alaska Reds	743,768	17,694	1,665	763,127	784,795
Cohoes, Silvers, Medium Reds	54,972	4,967	19,720	79,659	89,793
Pinks	95,310	3,238	1,006	99,554	215,308
Chums	22,858	21	1,878	24,757	45,409
Bluebacks	....	......	1,209	1,209	1,269
Steelheads	....	484	444	928	909
Totals	925,580	44,685	99,794	1,070,059	1,255,289

Fruit and Vegetable Market Competition

Carlot Shipments as Reported by the Bureau of Agricultural Economics, Department of Agriculture

	Week ending—			Season total to—	
Vegetables	June 3, 1938	June 3, 1939	May 27, 1939	June 3, 1938	June 3, 1939
Beans, snap and lima	151	206	341	7,534	6,188
Tomatoes	2,021	1,564	1,333	17,507	13,144
Green peas	58	188	317	3,140	3,650
Spinach	0	0	3	6,457	6,117
Others:					
Domestic, competing directly	2,526	3,158	3,695	102,556	101,316
Imports, competing indirectly	2	1	5	2,371	2,248
Fruits					
Citrus, domestic	3,613	3,303	3,572	125,573	136,308
Imports	12	0	0	126	77
Others, domestic	1,003	1,144	866	26,205	26,099

Canada Requires Conspicuous Origin Notice

The Canadian Meat and Canned Foods Act has been amended to require all cans of fish and shellfish imported into Canada to be labeled in a plain and conspicuous manner, according to a report from the American commercial attache at Ottawa. It had been found that the labels on imported canned fish products showed the place of origin in small letters and in an inconspicuous place on the label, and the amendment requires merely that all statements on the labels must be shown in a plain and conspicuous manner.

Another amendment brings within the scope of the Act all lobster meat cooked for sale, fresh or frozen, and packed in cans, bottles, packages, or other containers, but not preserved to keep.

Hearing on Coal-Tar Colors Scheduled July 5

A public hearing will be held in Washington on July 5 by the Department of Agriculture for the purpose of receiving evidence upon the basis of which regulations may be promulgated amending those regulations appearing in the *Federal Register* for May 9 by changing certain specifications of some of the listed colors and adding other coal-tar colors to the list.

The new coal-tar colors proposed for addition to the list, and the changes in specifications, are published in the June 3, 1939, issue of the *Federal Register*, which can be obtained from the Government Printing Office, Washington, D. C., for 10 cents a copy.

Packer Demand for New Jersey Asparagus Increases

A steadily increasing demand for asparagus for freezing and canning has been reported by the New Jersey Department of Agriculture. Approximately 4,000 acres are under contract to packers this year.

Processing plants purchase entirely on a grade basis under the direct inspection of the New Jersey Department of Agriculture. The Department announced that more than 1,000 acres of New Jersey's finest quality asparagus is being marketed this season under a distinctive label identifying it "as a superior and nearby product." Use of the label is restricted to members of the marketing group who agree to package under a definite quality standard, "which is equivalent to the highest Federal-State requirements."

CONSUMER COMPLAINT SERVICE

Association's Rules Revised to Conform to Trust Indenture Amendment

At the meeting of the Administrative Council on May 17, an amendment to the Trust Indenture of 1932 was approved through adoption of the following resolution:

"By resolution of the Administrative Council of the Association on May 17th, 1939, it is further provided in the case of injuries sustained after the date of this resolution, that if the total judgments or settlements which involve the product of any member and which are each in amount not less than $100 and not more than $1,000, shall in any calendar year exceed the aggregate of $5,000, the amount of such excess over $5,000 may be paid by the Trustees, subject to all other provisions of said Trust Indenture."

The above amendment made necessary a revision of the rules governing the Association's consumer complaint service, and the summary of the provisions of the Trust Indenture. This has been done with the approval of the Association's general counsel.

Rules Governing Consumer Complaint Service

The revised rules follow; the only changes are in paragraphs numbered 7 and 8, the change in paragraph 7 being simply for the purpose of clarification:

The National Canners Association has offered to contest unfounded complaints of consumers involving its members' canned products, in accordance with the resolution of its Board of Directors adopted in May, 1923.

This resolution provided that the costs of defense of alleged food poisoning cases was to be included in membership service, subject to the approval of the general counsel of the Association, and the rules and regulations governing the same to be recommended by him. This service was extended later to cover cases of alleged injury. These costs were not to include the payment of damages if the court awarded the same.

Accordingly, this matter has been taken up with the Association's general counsel, Covington, Burling, Rublee, Acheson and Shorb, in order to establish a uniform practice in this respect. Our counsel have expressed their opinion that this Association should not be called upon to pay for the services and expenses in connection with such suits where the service and expense are under the direct control of the member and are simply in line with such proper cooperation as the member should afford to the Association's counsel who has been retained to defend the suit. These services and expenses are such as would be rendered or incurred by the member in conducting his own affairs, and while they are, of course, connected with the lawsuit, they are quite distinct from the services and expenses of counsel engaged to defend it. It seems that members should cooperate to any reasonable extent in providing assistance in defending suits in which their products are involved.

The Association's general counsel therefore recommends that the Association services in the defense of such suits should be as follows:

1. The Association will continue to investigate all consumer complaints involving canned products of its members, and will pay the cost of such investigations.

2. The Association will find and engage lawyers to defend suits of this kind, whether the member is being sued directly or whether the suit is against the distributor or grocer who has sold the member's canned product involved in the suit; provided, however, that the general counsel of the Association believes the claim to be unjustified and that it should be contested; and provided further, that the member requests the Association to defend the suit and agrees to pay any judgment that may be rendered against the defendant.

3. The Association will pay the fees and necessary expenses of the lawyers engaged by it, bills for such service and expenses to be submitted directly to the Association.

4. The Association will engage the services of and pay the fees and expenses of expert medical and bacteriological witnesses if such are considered necessary by the lawyer selected by the Association to handle the case.

5. The Association does not pay the travelling expenses of the member or distributor involved or of any of their officers or employees, incurred in connection with the suit. Neither does the Association pay any counsel fees, except to counsel employed by the Association and for services authorized by the Association.

6. The Association does not pay stenographic, commissioners' or counsel fees incurred in the taking of depositions of members or of any of the officers or employees of members.

7. In no event is the Association to be in any way responsible for the outcome of the suit. The Association does not pay any judgment obtained or any part thereof. However, the Trustees of the Special Protective Fund, created under the Trust Indenture of April 1, 1932, may under conditions specified in the Trust Indenture, contribute to the payment of judgments or settlements in excess of $3,000 in case of claims of injury sustained from April 1, 1932, to May 22, 1935, and in excess of $1,000,

in case of claim of injury sustained on or after May 22, 1935, provided that the amount payable by the Trustees shall not, in any case, exceed $24,000.

8. By resolution of the Administrative Council of the Association on May 17th, 1939, it is further provided in the case of injuries sustained after the date of this resolution, that if the total judgments or settlements which involve the product of any member and which are each in amount not less than $100 and not more than $1,000, shall in any calendar year exceed the aggregate of $5,000, the amount of such excess over $5,000 may be paid by the Trustees, subject to all other provisions of said Trust Indenture.

Summary of Trust Indenture Provisions

The revision of the summary of the provisions of the Trust Indenture made necessary the addition of a paragraph, No. 5, and renumbering of the two following paragraphs. The revised summary is as follows:

The attention of members of the National Canners Association is especially called to certain provisions of the Trust Indenture approved by the Administrative Council, providing protection against damage claims.

1. The three Trustees have charge of the special fund of $50,000, and may in their discretion use it toward the payment of judgments or settlements in connection with claims of illness or injury occurring subsequent to April 1, 1932, and involving only canned products of members in good standing.

2. The Trustees can not make payment on any judgment or settlement unless the canner whose product is involved was a member of the Association in good standing at the time the injury in question was sustained.

3. The By-Laws define a member in good standing as follows: "No member whose dues are in arrears after ninety days from the date when any statement of account is mailed by the Association shall be considered as being a member in good standing until such dues shall have been paid in full."

4. The Trustees can use the fund for the payment of that portion of any judgment or settlement in excess of $1,000, provided that the amount payable by the Trustees shall not, in any case, exceed $24,000. This protection applies in case of judgments rendered against wholesalers and retailers who may be defendants in litigation involving products of members, as well as to judgments rendered against members.

5. In the case of injuries sustained after May 17, 1939, if the total judgments or settlements which involve the product of any member and which are each in amount not less than $100 and not more than $1,000, shall in any calendar year exceed the aggregate of $5,000, the amount of such excess over $5,000 may be paid by the Trustees, subject to all other provisions of said Trust Indenture.

6. In determining whether to contribute toward the payment of any judgment or settlement, the trustees may consider whether a member has complied with the By-laws of the Association, with laws and regulations relating to canned foods, and with approved canning practices, and whether both member and distributor have fully cooperated with the Association in the handling and defense of the claim.

7. In case of a new member, the Trustees can not make any payment in connection with a claim involving canned food packed by such member more than one year before his admission to membership.

Separate copies of the rules and the summary will be supplied to members upon request.

Study of Hawaiian Fishery Resources Planned

Recommendation that Congress appropriate funds for a thorough study of the fishery resources of the Hawaiian Islands is included in a plan for the development of Hawaiian fisheries published by the Department of Commerce. Because of increasing scarcity of fishes around the shores of the islands, apprehension has been felt locally for the future of the fish supplies.

USE OF RECOMMENDED FORM OF CANNED FOOD GUARANTY ADVISED

Form Approved by Conference Committee Safeguards Both Canner and Buyer

The Association continues to receive a large number of inquiries concerning the type of food guaranty which canners should give to their buyers. Many of these inquiries indicate that buyers frequently request the canner to give guaranties different from and usually much broader than the uniform guaranty recommended by the Association for use by its members. This guaranty, which has been approved by the various distributor organizations, was published and fully discussed in the INFORMATION LETTER of April 1, 1939.

In view of the many requests that canners have been receiving from buyers that they sign guaranties broader than this recommended form, it has been deemed advisable once again to set forth the text of this recommended food guaranty, and to again urge upon canners the inadvisability of departing from this recommended form.

The recommended form is as follows:

"Seller guarantees that none of the articles of food sold under this contract will be adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, and that such food will not be produced or shipped in violation of Section 404 or 301 (d) of said Act; provided, however, that the seller does not guarantee against such goods becoming adulterated or misbranded within the meaning of said Act after shipment by reason of causes beyond seller's control; and provided also that where goods are shipped under buyer's labels, seller's responsibility for misbranding shall be limited to that resulting from the failure of the product to conform to the label furnished by the buyer. Buyer undertakes to save seller harmless from any liability under said Act for any other type of misbranding arising out of the use of buyer's labels, or for any liability under said Act for misbranding where buyer insists upon the use of any label after seller has questioned in writing the use of such label."

The form set forth relates to a specific sale covered by a particular contract. Where a continuing or blanket guaranty is desired the beginning of the guaranty should read as follows:

"Seller guarantees that no articles of food sold by seller to buyer during the period in which this guaranty is effective will be adulterated . . ." [Remainder as in the form quoted above.]

Where this continuing or blanket guaranty is used, the buyer's signature should be obtained, inasmuch as the guaranty contains an undertaking on the part of the buyer. If the guaranty is merely included in a sales contract, the buyer's signature to the contract will suffice.

This recommended form of food guaranty under the Federal law has been approved by the following distributor organizations, which are represented in the Joint Conference Committee of Canners and Distributors, and has been recommended by these organizations for the use of their members: National-American Wholesale Grocers Association, United States Wholesale Grocers Association, Cooperative Food Distributors of America, Super Market Institute, Inc., and the National Food Brokers Association. While approval by the Joint Conference Committee does not require the members of the various associations to use this particular form, and they are, of course, free to adopt any form which they see fit, the Association believes it highly desirable that this form be followed wherever possible. The form was adopted and approved only after careful and extended study of the various problems involved. It is designed to meet the requirements set forth in the Federal Food, Drug, and Cosmetic Act for guaranties that will relieve the buyer of responsibility under that Act, and it is believed that the clause will satisfactorily achieve this result. Finally, the desirability for uniformity throughout the industry in the clause used is so obvious that it needs little comment.

Many of the broader forms of guaranties which have recently been submitted to canners—no doubt as a result of the adjustments made necessary by the new Federal Food, Drug, and Cosmetic Act—contain provisions which are believed to be unwarranted. For example, many of these guaranties require the canner to guarantee that his products will in all respects comply with and conform to the laws of every State, now in force or hereafter enacted. Blanket guaranties as to compliance with State statutes such as these might very well be productive of difficulties, and their use is not recommended. There would, of course, be no objection to a canner guaranteeing that his products comply with the laws of a specific identified State or States in which they are to be resold. The difficulty of knowing in advance the States in which the products might be resold, however, renders the use of a limited guaranty of this type impractical.

On the other hand, a broad blanket guaranty of compliance with all State statutes is objectionable because some of these State laws might contain peculiar provisions not found in the Federal Act, and in the absence of a check of the statutes of every State, the canner would have no way of knowing whether his products actually would comply with the laws of all States. In addition, some State statutes require that food products be registered (for which registration an annual fee is charged) before the products may be legally sold in the State. A broad guaranty of compliance with all State statutes might require a canner to register his products in all States in which this requirement existed and in which there was any possibility that the product might be resold.

Finally, there is considerable doubt whether this type of guaranty of compliance with State statutes would prove particularly beneficial to the buyer. One of the principal purposes of giving such a guaranty is to relieve the buyer of responsibility under the State statutes. Under many of the State statutes, however, a guaranty is effective for this purpose only if it is signed by someone *residing within the particular State*, and only if it refers specifically to the laws of that State. A blanket guaranty would not meet these requirements. Where these strict requirements are not found, a guaranty, such as that recommended by the Association, that the product is not adulterated or misbranded under the Federal Act, would in most cases afford the buyer adequate protection against misbranding under the State statutes.

Another objection to many of the broader forms of guaranty submitted to canners is that they do not contain adequate safeguards concerning the use of buyer's labels, and concerning the possibilities of adulteration arising after sale and shipment by reason of causes beyond the control of the seller. The form recommended by the Association contains specific provisions controlling the respective liabilities of canner and buyer where buyer's labels are used. These provisions are necessary to afford the canner proper protection and are fair and adequate from the standpoint of the buyer.

Finally, many of the broader forms of guaranty also contain provisions requiring the canner to indemnify the buyer against any and all claims which may be made by consumers, irrespective of the validity of the claims, and irrespective of whether the injury to the consumer is attributable to the condition of the canned foods at the time of their sale to the distributor, or to causes arising after such sale. The Association has never recommended the use of any indemnity agreement of this type since it is felt that the ordinary implied warranty of quality and merchantability would, in all cases, afford the buyer adequate protection. Moreover, the operation of the Association's Consumer Complaint Service affords additional protection to both the canner and the buyer.

For the foregoing reasons, it is recommended that the approved food guaranty form set forth above be used in all cases.

CONTENTS